IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 79-5301

THOMAS MILTON WILSON

Petitioner

vs.

STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

William N. Clark
1033 Frank Nelson Building
Birmingham, Alabama 35203

Counsel (Pro Bono) for Petitioner

I N D E X

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED. 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATUTORY PROVISIONS INVOLVED. 3

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT 5

I. The decision of the Supreme Court of Alabama affirming the constitutionality of the Alabama death penalty statute is contrary to the decisions of this Court in that the statute is unconstitutional in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

A. The Alabama death penalty statute promotes arbitrary and capricious decisions by the jury by limiting the jury's decision to "not guilty" or "death" without regard to mitigating circumstances.

B. The provisions of the Alabama death penalty statute which circumscribe the mitigating circumstances which may be considered by the trial court and in effect shift the burden to the defendant to prove why he should not be electrocuted result in the likelihood of arbitrary, capricious and prejudicial imposition of the death penalty.

C. Alabama appellate review of death penalty decisions is insuficient to meet the mandates of this Court in that it fails to provide a meaningful safeguard against arbitrary, capricious and prejudicial imposition of the death penalty.

II. The exclusion of prospective jurors in a case in which the death penalty may be imposed where the excluded jurors have not made it unmistakeably clear that their attitude toward the death penalty would prevent them from rendering an impartial decision as to the defendant's guilt violates the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX

Opinion of the Alabama Court of Criminal Appeals, February 21, 1978 . . . . . A-1

Decision of the Alabama Supreme Court A-2

Decision of the Alabama Supreme Court A-3

Decision of the Alabama Supreme Court A-4

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment, VIII 3

United States Constitution, Amendment, XIV 3

CASES

Bell v. Ohio, U.S. , 57 L.Ed.2d 1010 (1978). 7,8

Davis v. Georgia, 429 U.S. 122, 50 L.Ed.2d 339 (1976). . . . 12,13

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972) . . . 6,7

Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976). . . . 6,10

Jurek v. Texas, 428 U.S. 153, 49 L.Ed.2d 929 (1976) 7,10

Lockett v. Ohio, U.S. , 57 L.Ed.2d 973 (1978) 7,8

Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976) . . 6,10

Stanislaus Roberts v. Louisiana, 428 U.S. 325 49 L.Ed.2d 974 (1976) 7

Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 76 (1968). 11,12,13

Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944. . . 7,10 (1976)

Flanigan v. State, 266 So.2d 643 (Ala. 1972) 11

Jacobs v. State, 361 So.2d 640 (Ala. (1978) 8

STATUTES

Ala. Code §§13-11-1, et. seq. 2,3,4,5,8,9,10

Ala. Code §12-22-150 3,11

Rule 39 (c), Alabama Rules of Appellate Procedure. 3,11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

THOMAS MILTON WILSON

Petitioner,

vs.

STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Thomas Milton Wilson, prays that a writ of certiotati issue to review the judgment and opinion of the Supreme Court of Alabama entered on February 9, 1979, rehearing denied June 22, 1979, affirming the imposition of the death penalty imposed on the defendant in the Circuit Court of Mobile County, Alabama.

OPINIONS BELOW

The opinion of The Alabama Court of Criminal Appeals affirming the judgment of the Mobile Circuit Court appears as Appendix A-1 and is reported at So. 2d (Ala. App. 1978). The Writ of Certiorari to the Alabama Court of Criminal Appeals was granted by the Supreme Court of Alabama on May 23, 1978, but quashed as being improvidently granted on February 9,1979. See Appendix A-2. The application for rehearing was subsequently granted and the order of February 9, 1979 set aside. In the same order the Supreme Court of Alabama affirmed the judgment of the Alabama Court of Criminal Appeals without an opinion. See

Appendix A-3. Appellant's petition for rehearing was denied on June 22, 1979. See Appendix A-4.

JURISDICTION

The judgment of the Supreme Court of Alabama affirming the conviction and imposition of the death penalty was entered on February 9, 1979. The Defendant's petition for rehearing was denied on June 22, 1979. This petition for writ of certiorari is to review the judgment of said court in a state criminal case where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution and other Constitutional rights are claimed to have been violated. This petition is filed less than 90 days after the final judgment of the said court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) which statutory provision is believed to confer jurisdiction on this Court.

QUESTIONS PRESENTED

The Petitioner was tried and convicted of capital murder in the Circuit Court of Mobile County and sentenced to death. The questions presented are:

1. Is the Alabama death penalty statute, Ala. Code, §§13-11-1, et.seq. unconstitutional in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

A. Does the Aalbama death penalty statute that requires the jury to either aquit the defendant or to impose the death penalty without consideration of mitigating factors promote arbitrary and capricious decisions in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

B. Do the provisions of the Alabama death penalty statute which circumscribe the mitigaging circumstances which may be considered by the trial court and in effect shift the burden to the defendant to prove why he should not be executed create the likelihood of arbitrary, capricious and prejudicial impos-

ition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

C. Is the appellate review as provided in the Alabama death penalty statute and other Alabama statutes sufficient to protect a defendant from arbitrary, capricious, and prejudicial imposition of the death penalty as required by the Fourteenth Amendment to the Constitution of the United States?

2. Does a trial court violate the Fourteenth Amendment to the Constitution of the United States by excluding prospective jurors in a trial in which the death penalty may be imposed where the excluded jurors have not made it unmistakeablely clear that their attitude toward the death penalty would prevent them from rendering an impartial decision as to the Defendant's guilt?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Constitution of the United States, Amendment XIV

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Alabama Code, §§ 13-11-1, et.seq. See Appendix B

Alabama Code § 12-22-150

> In all cases wherein a defendant is tried and convicted for the commission of a felony against the peace and dignity of the state of Alabama and the death sentence is imposed, it shall be the duty of the trial judge, immediately after the imposition of sentence, to enter or record, with our without the direction or election of the defendant, that the defendant appeals from said judgment of conviction. Upon the entry of appeal from such judgment of conviction, execution of sentence shall automatically be stayed pending said appeal. Said appeal, except as otherwise provided in this division, shall in all respects be governed as provided by law and rules of court.

Rule 39 (C), Alabama Rules of Appellate Procedure, The petition for writ of certioari to this court in a criminal case in which the death penalty was imposed will be granted as a matter of right. . . .

STATEMENT OF THE CASE

Petitioner, Thomas Milton Wilson, was indicted under Act 213, Alabama Legislature, (1975), Ala. Code §13-11-1, et.seq. on June 10, 1977. After being determined to be indigent by the court, the petitioner, with his appointed counsel present, was arraigned. He was charged in paragraph one of the indictment with murder committed while under a life sentence in prison, and in the second paragraph with murder while having been convicted of murder in the first or second degree in the twenty years preceding the crime.

During the course of qualifying the jurors, Petitioner's counsel objected to the questions asked by the trial court to the juror's eliciting their opinions concerning the death penalty, and to the exclusion by the court of certain jurors who had expressed their opposition to the death penalty. (R. 41-51). Petitioner contended that the questions and the exclusion of the jurors denied him rights secured by the Fourteenth Amendment to the Constitution of the United States. This question was presented to both the Alabama Court of Criminal Appeals and the Alabama Supreme Court for review.

The charge against the petitioner was based on the shooting of one Joe Gilliland in the trailer of Mary Helen Leonard. After Mrs. Leonard and the petitioner had returned to the trailer one evening, Mrs. Leonard went into her bedroom while the petitioner waited in the dining room. Gilliland, who was renting a room from Mrs. Leonard, was apparently in another bedroon. Mrs. Leonard and her two sons then heard shots. Gilliland was found dead and the petitioner was seen driving away in an automobile. There were no eye witnesses to the shooting. The petitioner was subsequently arrested with certain identification records belonging to the deceased. The state sought to

prove a prior murder conviction in Georgia for which the petitioner was given life (R. 169-172). The trial began on July 20, 1977. On July 21, 1977, the jury entered its verdict finding the petitioner guilty of capital murder and fixing his punishment at death by electrocution. (R. 8). On July 22, 1977, after hearing evidence offered by the district attorney as to petitioner's prior record, and a statement from the petitioner as to the invalidity of at least one of those charges, the trial court entered its order finding the petitioner guilty of capital murder and sentencing him to suffer death by electrocution. (R.18-23). Petitioner's motion for new trial in which the constitutionality of the statute was raised was denied. (R.29-30).

The Alabama Court of Criminal Appeals affirmed the conviction finding that the statute was constitutional in all respects (App. A-1). The court further found that there had been no constitutional violation by the questioning or exclusion of jurors concerning the death penalty. After an initial grant of certiorari by the Alabama Supreme Court, subsequent quashing of the grant of the writ, the petitioner's writ of certiorari was granted and the judgment of the trial court affirmed without written opinion. Neither court made any comments with regard to proportionality.

Petitioner is presently incarcerated in a State penitentiary at Atmore, Alabama, and has been incarcerated since his arrest in 1976.

REASONS FOR GRANTING THE WRIT

I A

The Alabama death penalty statute, Acts 1975. No. 213, Ala. Code §13-11-1, et seq., that requires the jury to either aquit or to impose the death penalty without the consideration of any mitigating factors promotes arbitrary and capricious imposition of the death penalty in violation of the defendant's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

Under the Alabama death penalty statute, once a defendant is indicted under that statute and his trial proceeds before a jury, at the conclusion of the case, the jury is given only two options--either to return a verdict of not guilty and release the defendant or to impose the death penalty. The jury does not hear any evidence in mitigation. However, once the death penalty has been imposed by the jury, the trial court is required by the statute to hear evidence of both mitigating and aggravating circumstances. The judge may then allow the death penalty to stand or to impose a sentence of life in prison without parole.

Since Furman v. Georgia, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), this Court has reviewed several state capital punishment statutes which have been drafted in an effort to avoid Furman's prohibition against allowing juries unbridled discretion in sentencing persons to death. In one of the first of those decisions, Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859 (1976), this Court upheld the Georgia death penalty statute concluding that it satisfied the requirement that the discretion to impose the death penalty "be suitably direct and limited so as to minimize the risk of wholly arbitrary and capricious action." Under the Georgia statute, the jury first determines guilt or innocence without regard to punishment. In a subsequent hearing, after considering evidence in mitigation and aggravation, the jury determines whether or not the death penalty should be imposed. This Court found particularly significant in the Georgia statutory scheme the provision for automatic appeal to the State Supreme Court of all death sentences. The Georgia appellate court is required to review each sentence to determine whether it has been perhaps imposed because of passion or prejudice or is improper in comparison with sentences imposed in similar cases.

This Court also upheld the Florida statute in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed 2d 913 (1976). Under that statute, the jury first decides guilt or innocence. The trial judge then imposes the

the sentence after hearing any mitigating or aggravating circumstances. Similar to the Georgia system, the Florida system requires the state supreme court to automatically review the case and includes a proportionality system. The Texas system, similar to Georgia's was upheld in Jurek v. Texas, 428 U.S. 242, 49 L.Ed.2d 929 (1976).

In four subsequent cases, this Court has struck down state death penalty statutes. In Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944 (1976), this Court found the North Carolina mandatory death penalty statute unconstitutional. This Court concluded that the North Carolina statute was an inadequate response to the demands of Furman v. Georgia, supra. One key failure of the statute was the absence of any objective standards to assist in imposing sentence. The jury was presented only with the aggravating circumstances. The Court further found the statute infirm because it had no provision for automatic, systematic appellate review. On similar grounds, this Court found the Louisiana death penalty statute unconstitutional in Stanislaus Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974 (1976).

In Lockett v. Ohio, U.S. , 57 L.Ed 2d 973 (1978) and Bell v. Ohio, U.S. , 57 L.Ed. 2d 1010 (1978), the Ohio statute was found to be unconstitutional because it provides for mitigation in only three specific situations. This Court found Eighth and Fourteenth Amendment violations, concluding that the sentencing authority in a capital case should be permitted to hear any mitigating factors.

The Alabama system is unique in that if the jury determines that the defendant is guilty it has no alternative but to impose the penalty of death. To suggest that the jury's decision is only in the nature of an advisory opinion is contrary to the clear meaning of the statute. The sentence is death unless the trial judge after hearing evidence of both aggravating and mitigating circumstances elects to impose a sentence of life imprisonment. A jury under such circumstances is under overwhelming presure. If it concludes that a defendant is guilty but feels that the crime does not warrant the death penalty it

must decide between allowing a person it had deemed to be guilty of murder to be released on the streets or sentencing him to death. There is no provision in the statute for the jury to be instructed by the court that it could in fact fail to agree in the fixing of the penalty of death which would lead to a declaration of a mistrial by the Court and a possibility that the defendant might be reindicted for a non-capital offense. Ala. Code §13-11-2 (C). Under the latter provision if the defendant were reindicted for a non-aggravated offense the punishment could not be death or life inprisonment without parole.

Given the public outcry against crime in the United States it is frightening to think that a jury should be confronted with such a choice. The potential for an arbitrary or capricious decision is clearly present.An excellent argument in this regard was made by Justice Jones of the Alabama Supreme Court in his dissenting opinion in Jacobs v. State, 361 So 2d 640, 649-50 (Ala. 1978). The Alabama statute should be declared unconstitutional.

I B

The provisions of the Alabama death penalty statute which circumscribe the mitigating circumstances which may be considered by the trial court and in effect shift the burden to the defendant to prove why he should not be electrocuted result in the likelihood of arbitrary, capricious and prejudicial imposition of the death penalty.

In both Lockett v. Ohio, supra, and Bell v. Ohio, supra., this Court found that statutory limitation of the grounds of mitigation that could be considered by the sentencing authority rendered the statute unconstitutional. In Ohio, the statute provided for mitigation in only three specific situations. Although the Alabama statute provides that evidence may be presented to the trial judge as to any matter that the court deems relevant to sentence, Ala. Code §13-11-3, the statute further specifies only seven mitigating circumstances which shall be considered by the court, Ala. Code, §13-11-7. The trial court is required, if it imposes a sentence of death, to specify in writing

those mitigating circumstances which it finds insufficient to outweigh the aggravating circumstances, Ala. Code, §13-11-4.

Although arguably any matters could be presented to the trial court " relevant to sentence", trial judges are likely to construe the statute as limiting mitigating circumstances which they may consider. The decision of the trial judge in this case clearly illustrates this deficiency. In his order the judge said," . . . I have conducted an Aggravation and Mitigation Hearing under Section 3 of Act 213; of the seven mitigating factors that are mentioned, the defendant has only . . ." (R. 18). Both defendant and judge are constrained from looking beyond the statute. If the statute does not in fact limit the mitigating circumstances which may be considered, its language is so ambiguous as to render it unconstitutional.

Because the jury under the Alabama death penalty statute must impose the death penalty if it determines that the defendant is guilty, it follows that the jury must conclude beyond a reasonable doubt that the death penalty must be imposed. This is so because under the Alabama statute a finding of guilt and the death penalty are inextricably connected. Thus, when a defendant enters the post verdict sentencing hearing he is immediately confronted with what is in essence a presumption that the offense was so aggravated that the death penalty must be imposed. He, therefore, has the burden to present evidence in mitigation. Such a presumption obviously places an undue constraint on the trial court to abide by the finding of the jury. If there is to be a sentencing hearing that is free from the possibility of arbitrary and capricious notions, then the hearing must begin with only a finding of guilt, not a sentence of death as is required in the Alabama statutes.

Furthermore, under the Alabama statute there is no burden placed on the trial court to make any inquiry as to mitigating circumstances if none are presented by the defendant. This procedure further blights the Alabama statute. Neither a presentence report nor a psychiatric report is required under the statute. This is so even though the

extreme mental or emotional distrubance of the defendant while committing the offense is a mitigating circumstance. In this case, in a pre-trial motion, the defendant had sought a psychiatric exam. (R.4). The trial court denied the motion. (R. 6).

The Alabama death penalty statute which in essence limits mitigaging factors which may be considered by the court, which places the burden upon the defendant to overcome a presumption of aggravation,and which would allow a trial judge to impose the death penalty without considering any mitigating circumstances if a defendant stood mute, creates too many possibilities for the penalty of death to be imposed arbitrarily and capriciously. It does not meet the standards of the Eighth and Fourteenth Amendments.

I C

Alabama appellate review of capital cases is inadequate to protect a defendant from arbitrary, capricious and prejudicial imposition of the death penalty in violation of the Fourteenth Amendment to the Constitution of the United States.

In Gregg v. Georgia, supra., this court emphasized that automatic review by the state supreme court provides a meaningful safeguard against arbitrariness. This court found it significant in both Gregg v. Georgia, supra., and Proffitt v. Florida, supra., that the state supreme court review included a review of each sentence with regard to relative sentences imposed in similar cases. This Court struck down the North Carolina statute, in part, because it contained no provision for automatic, systematic appellate review. Woodson v. North Carolina, supra.

The Alabama death penalty statute provides in §13-11-5, that "The judgment of conviction and sentence of death shall be subject to automatic review as now required by law." There is no provision for any expedited appellate review as is the case under the Texas statute. Jurek v. Texas, 428 U.S. 242, 49 L.Ed. 2d 929 (1976).

The "law" referred to in the "automatic review" portion of the Alabama death penalty statute, is Ala. Code §12-22-150 and Rule 39 (c) of the Alabama Rules of Appellate Procedure. The Code provision merely provides that the court of criminal appeals must review a death penalty case. However, there is no guidance as to what the appellate court must review and there is no express provision for review of sentencing. Rule 39 (c) merely provides that a petition for certiorari in a death penalty case will be granted as a matter of right. Again, there is no statement as to the scope of review. Without any legistative dirction, the Alabama courts must look to their own decisions. In Flanigan v. State, 266 So.2d 643, 645 (1972), the Alabama Supreme Court reiterated that review by writ of certiorari is limited to questions of law. The Court emphasized that it looked to the opinion of the lower court for the findings of fact. That decision has not been overruled by subsequent decisions of the Alabama Supreme Court.

The Alabama statutory scheme does not provide the type of appellate review contemplated ty this Court. No method is established for proportionality review. The Alabama Supreme Court may as in this case simply affirm the decision of the lower court without opinion, thus making it difficult for any subsequent review by this Court. The Alabama system for appellate review in capital cases does not meet constitutional requirements established by this Court.

II

The trial court excluded prospective jurors, in violation of the Fourteenth Amendment to the Constitution of the United States, who had not made it unmistakeably clear that their attitude toward the death penalty would prevent them from rendering an impartial decision as to the defendant's guilt.

Defendant's objections to the questions asked by the court and to the subsequent exclusion of certain jurors were clearly noted (R. 40-51). This Court in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 76 (1968),

held that before a juror in a death penalty case may be excluded for cause he must make it "unmistakeably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." This Court reiterated the affirmations of Witherspoon in Davis v. Georgia, 429 U.S. 122, 50 L.Ed 2d 339 (1976). There the Court held that unless a juror is irrevocably opposed to imposition of the death sentence under any conditions he may not be excused for cause. Similarly, if any juror has been excused for expressing only general objections to the death penalty then a sentence of death is invalid.

In this case, five jurors were excluded by challenges for cause arising out of their general objections to the death penalty. The questions asked by the court which resulted in the jurors being challenged did not actually determine whether the jurors attitude would prevent him or her from making an impartial decision. For example, the following question was asked by the trial court:

> If the State proves that, and also in addition proves that Mr. Wilson was under a sentence of life imprisonment prior to this, would you have a fixed opinion against imposing the death penalty?

The juror's affirmative response resulted in her exclusion for cause. (R.44). Another juror stated "I don't believe that I could kill him" and said that he had a conviction against the death penalty. He was challenged for cause. (R.45). Still another juror was excused because he responded affirmatively to a question asking whether he had a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty. (R.45).

After having sustained challenges for cause as to the jurors, the court then made the general statement that it intended to ask the jurors whether if they were required to return a verdict of guilty which would automatically fix the defendant's punishment at death if they had an abiding conviction against assessing such a verdict. The court then stated it believed that the five jurors had said that they

would and asked if those five understood the question the same way that he had intended it. The record merely reflects that "the five said jurors nodded in the affirmative." (R. 46).

It cannot be said that the record in this case makes it unmistakably clear that the attitude of those jurors excused because of their attitude toward the death penalty would have prevented them from making an impartial decision as to the defendant's guilt. Given the ambiguous nature of the questions asked by the trial court and the at best equivocal answers given by the jurors, the standards of Witherspoon, supra. and Davis, supra. have not been met.

CONCLUSION

This petition brings before the Court a State death penalty statute of a type which has not yet been reviewed by this Court. The Court has not yet directly considered a State death penalty statute such as Alabama's which provides that the jury imposes the death sentence simultaneously with its finding of guilt. This key defect in the statute when considered with its other infirmaties make it one which should be reviewed by this Court. Token appellate review by state courts of death penalty cases should not be condoned. This case presents the opportunity for this Court to make clear what is expected of the state courts in this regard. The Witherspoon issue raised here merits the Court's attention because of the increasing frequency with which State trial courts must deal with the issue.

Respectfully submitted,

William N. Clark
Attorney (Pro Bono) for Petitioner
1033 Frank Nelson Building
Birmingham, Alabama 35203

FEB 21 1978

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1977-78

1 Div. 866

Thomas Milton Wilson
Alias Tommy Wilks

v

State

Appeal from Mobile Circuit Court

BOWEN, JUDGE

The appellant was indicted and convicted of capital murder under those portions of the Alabama Death Penalty Statute prohibiting any murder committed by a defendant who has been convicted of murder in the first or second degree in the twenty years preceding the crime or any murder committed while the defendant is under a sentence of life imprisonment.

Sections 13-11-1 through 9, Code of Alabama 1975. Punishment was fixed at death in the electric chair. Both at trial and on appeal the appellant is represented by court appointed counsel.

The facts reveal that Joe Lee Gilliland, the deceased, rented a room in a house trailer owned by Mrs. Mary Helen Leonard. Mrs. Leonard and her two sons also lived in the trailer. Mrs. Leonard, Gilliland, and the appellant were old acquaintances, and on the day before the shooting, which occurred on November 22, 1976, the appellant and Gilliland had been drinking together in the trailer.

On the evening of the shooting, Mrs. Leonard had been with the appellant at a local "beer joint" and had asked him to drive her home because someone had borrowed her automobile. Mrs. Leonard and the appellant arrived at her trailer in the appellant's car and went inside where Mrs. Leonard's two sons were watching television. Gilliland was in his room lying in bed. No one else was in the trailer. Mrs. Leonard left the appellant in her dining room while she went to her bedroom to use the bathroom and put on her house shoes. While Mrs. Leonard was in the bedroom and her sons were watching television a shot was heard.

Mitchell Leonard, Mrs. Leonard's sixteen year old son, ran to Gilliland's room and discovered that Gilliland had been shot in his bed. Anthony Crooms, Mrs. Leonard's youngest son, ran out the front door of the trailer to get his sister and her husband who lived next door. Anthony saw the appellant run across the yard and leave in his automobile.

No one had seen the appellant enter Gilliland's room, shoot him or exit the trailer. After the shooting, the appellant was not to be found in Mobile, Alabama. Expert testimony attributed the cause of Gilliland's death as being a gunshot wound with massive injury to the brain and massive hemorrhage.

In December of 1976 the appellant was arrested at his mother's home in Decatur, Alabama. Upon his arrest, the appellant identified himself as Joe Gilliland and produced a temporary driver's license and a Red Lounge

membership card issued to Joe Gilliland. These were the only items of identification contained in the appellant's wallet.

The Assistant Chief of Police for LaGrange, Georgia, testified that this very same appellant had received a life sentence for murder in Georgia in 1969.

Immediately after the state rested its case, the defense rested without interposing any motion or objection to test the sufficiency of the evidence against the appellant. The attorneys presented their closing arguments to the jury, the trial judge charged the jury, and after due deliberation, the jury found the appellant guilty as charged in the indictment.

The following day a hearing was held on the aggravating and mitigating circumstances as required by statute to determine whether the trial judge would sentence the appellant to death or to life imprisonment without parole. At the conclusion of the hearing the court made formal findings of fact. The trial judge found that there were "absolutely no mitigating circumstances" and that "the aggravated circumstances are overwhelming". Particularly, the court found that on May 14, 1969, the appellant was convicted in the Superior Court of Troop County, Georgia, of murder, with a verdict of guilty - recommendation of mercy, with a sentence of life during his natural life; that on March 11, 1977, the appellant was convicted of robbery in the Circuit Court of Morgan County, Alabama, and given a sentence of twenty years in the penitentiary[1]; that on February 24, 1976, the appellant was sentenced to life in the Mississippi State Prison on a charge of armed robbery, the sentence to run consecutively with the appellant's life sentence in Georgia; and that a 1964 charge of second degree murder against the appellant had been nol prossed. The court also found that the appellant had a "long, significant history of prior criminal activity". In its findings of fact the trial judge also stated that

---

1. This conviction arose from a robbery committed by the appellant after he committed the murder under review. It was on the robbery charge that he was arrested in Decatur, Alabama. This evidence was not presented to the jury.

"(t)he circumstantial evidence was rather overwhelming that Mr. Joe Gilliland was killed while he apparently was flat on his back in bed in his underclothes for no apparent reason . . . . The Court felt that the killing was about as senseless an act or uncalled for act as it has tried at anytime."

I

The appellant initially argues that the Alabama Death Penalty Statute is unconstitutional because a mandatory death penalty upon a finding of guilt without any consideration of aggravating or mitigating circumstances (by the jury) violates the Eighth and Fourteenth Amendments to the Constitution of the United States; because the post-jury verdict process violates due process by requiring the defendant, who is sentenced to die, to prove to the court why he should not die; and because the appellate review provided in the death penalty statute is inadequate to comply with constitutional demands.

Each of these arguments has been previously disposed of by this court and the constitutionality of the Alabama Death Penalty Statute upheld initially in Jerry Wayne Jacobs v. State, 6 Div. 389 (Ala. Cr. App., Ms. July 26, 1977) and subsequently affirmed in John L. Jacobs v. State, 6 Div. 383 (Ala. Cr. App., remanded for further proceedings, Ms. October 4, 1977) and Wayne Eugene Ritter and John Louis Evans, III v. State, 1 Div. 837 (Ala. Cr. App., Ms. October 25, 1977); and Ricardo Cook v. State, 6 Div. 489 (Ala. Cr. App., Ms. December 6, 1977). Since the appellant has raised no new or additional reason for invalidating the death penalty which we have not previously considered, we hereby reaffirm the constitutional soundness of that statute.

II

The appellant contends that the trial court erred to a reversal in excusing a juror for cause contrary to the admonition of the Alabama Supreme Court in Liddell v. State, 287 Ala. 299, 251 So. 2d 601 (1971), that, in a capital case, a juror cannot properly be excused for cause solely upon his answer that he has a fixed opinion ("conscientious scruples", "opposition") to capital punishment. Witherspoon v. Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776

(1968); Boulden v. Holman, 394 U. S. 478, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969); Howard v. State, 287 Ala. 435, 252 So. 2d 304 (1971); Jackson v. State, 285 Ala. 564, 234 So. 2d 579 (1970). A prospective juror may be excused for cause where he has been examined by the trial judge and a determination made that the juror's feelings as to capital punishment are sufficiently strong so that he would automatically refuse to impose a death sentence regardless of the evidence produced at trial and despite of the instructions of the trial court. Witherspoon, 391 U. S. at 522, 88 S. Ct. at 1777. In accordance with the general law that allows a juror who is not impartial to be challenged for cause, a prospective juror may properly be excused for cause where his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. Witherspoon, 391 U. S. 522, n. 21.[2]

A person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by the existing law and follow conscientiously the instructions of a trial judge and consider fairly the imposition of the death sentence in a particular case. Boulden, supra; Maxwell v. Bishop, 398 U. S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221. Thus when a juror indicates his beliefs against, scruples, or aversions to the death penalty, it becomes incumbent upon the trial court to ascertain whether the juror, notwithstanding his beliefs or scruples, would be able to impartially consider the issues with respect to the defendant's guilt, and, after having determined the defendant's guilt, be able to consider all the penalties provided by law, including the death penalty.

---

2. In Witherspoon, the court stated:
"We repeat, however, that nothing we say today bears upon the power of a State to exclude a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the time of the case before them or, (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to defendant's guilt."

In determining whether a prospective juror should have been disqualified from a capital case because of his opposition to capital punishment, the critical question for the reviewing court is not how the phrases employed in this area have been construed by the courts and commentators, but how they might be understood - or misunderstood - by prospective jurors. Boulden, supra. Whether a juror evidences absolute opposition to the death penalty so as to be excludable for cause under Witherspoon is a difficult question subject to seemingly inconsistent results on similar facts. Annotation: Beliefs regarding capital punishment as disqualifying juror in capital case - post-Witherspoon cases, 39 A. L. R. 3d 550.

Five jurors were challenged for cause by the state and excused because of their opinions on capital punishment. The trial court began its qualification of the veniremen on capital punishment with the following question:

> "Is there any juror who has a fixed and an abiding conviction against a legal punishment of death by electrocution? Those of you in Panel 1 who have such a fixed and abiding against a legal punishment of death by electrocution, please stand."

Defense counsel objected to this question and after overruling the objection the court continued to question the veniremen.

> "Did anyone in Panel 1 state that you had a fixed and abiding conviction against a legal punishment of death by electrocution that would prevent you from imposing a guilty verdict in this case - which is the only verdict you can return of guilt? You can return a verdict of Not Guilty; or you can return a verdict of Guilty, and if you do return a verdict of Guilty the statute provides that you must fix the punishment at death. (No response.) Does anyone in Panel 2 have a fixed and abiding conviction against fixing a punishment at death by electrocution in such a case as this? (Juror stood.) What is your full name, m'am?
>
> "JUROR: Donna Fulmer Keaton.
>
> "THE COURT: The statute provides that you will fix the death penalty if you find that Mr. Wilson did unlawfully, intentionally, and with malice aforethought, kill Joe Lee Gilliland; that constitutes what we normally consider the elements of First Degree Murder. If the State proves that, and also in addition to that proves that Mr. Wilson was under a sentence of life imprisonment prior to

this, would you have a fixed opinion against imposing the death penalty? (No response.) Just give us your best judgment - yes or no.

"JUROR KEATON: Yes."

The state then objected for cause, and the trial judge excused this juror over defense counsel's objection.

After similar questioning, the trial judge excused a second juror.

"THE COURT: Does any other juror in Panel 2 at this time have a fixed and abiding conviction against fixing the death penalty at death by electrocution if they find that this was a First Degree Murder committed after Mr. Wilson had previously been sentenced to life imprisonment? (No response.) In Panel 3? (Juror stood.) All right, sir; give us your full name.

"JUROR: Thomas Joseph Beckham.

"THE COURT: Mr. Beckham, you have a fixed opinion that under no circumstance would you sign any guilty verdict which would require the fixing of the death penalty?

"JUROR BECKHAM: I do."

A third juror was also excused for cause.

"THE COURT: Does any juror in Panel 4 have a fixed and abiding conviction against fixing the punishment at death by electrocution? (Juror stood.) Are you Mrs. Hobart?

"JUROR: Yes.

"THE COURT: If you found that the offense was Murder in the First Degree, and if you also found that Mr. Wilson had previously been sentenced to life imprisonment, would you have an abiding conviction against a verdict of guilty if it required the death penalty?

"JUROR HOBART: I would have mixed emotions about it.

"THE COURT: In your best judgment, yes you would, or no you wouldn't?

"JUROR HOBART: Right.

"THE COURT: Well, what are you telling us; are you --

"JUROR HOBART: Really, I don't believe in it.

"THE COURT: You do feel like you have a fixed opinion against it?

"JUROR HOBART: Yes."

A fourth prospective juror was excused for cause.

"THE COURT: Does any juror in Panel 5 have a fixed opinion against a legal punishment - finding a Defendant guilty and fixing his punishment at death by electrocution? (Juror stood.) What is your full name, m'am?

"JUROR: Yes, Betty Miller Brunson.

"THE COURT: Mrs. Brunson, you would have a fixed opinion against finding a verdict of guilty if you felt that it required the death penalty?

"JUROR BRUNSON: I don't believe I could say Kill Him.

"THE COURT: You feel that you do have a conviction against it?

"JUROR BRUNSON: Yes."

Finally, a fifth juror was excused for cause.

"THE COURT: Marshall Gunn in Panel 5; Mr. Gunn, do you have a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty?

"JUROR GUNN: Yes, sir."

Additionally the trial judge questioned the five excused jurors as a group.

"THE COURT: Now, what the Court intended to ask you is, after hearing all of the evidence in the case, if you were required to return a verdict of guilty, which would automatically fix his punishment at death, the Court has asked you now if you have an abiding conviction against assessing such a verdict? I believe that five of you have responded that you would; those five, is that the way you understood the question?
(The five said jurors nodded in the affirmative.)"

We have carefully examined the questions propounded to these five prospective jurors. In addition to being asked whether or not they were opposed to capital punishment each of the five jurors was also asked a question that elicited a reply indicating that under no circumstances would he vote in favor of the death sentence regardless of the evidence in the case. Although the questions put to these jurors were not expressed in the most articulate or exact language,

we find that the trial court made it unmistakably clear to these prospective jurors that only such jurors who could not or would not impose the death penalty under any circumstances would be excused for cause. "The test of Witherspoon is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." State v. Avery, 286 N. C. 459, 212 S. E. 2d 142 (1975). There is no requirement that the trial judge track the language of Witherspoon in examining the jurors with regard to their views on capital punishment.

In substance, Juror Keaton replied that she would have a fixed opinion against imposing the death penalty even if the state proved the appellant guilty as charged in the indictment. Juror Beckham stated that he had a fixed opinion that under no circumstance would he sign any guilty verdict which would require the fixing of the death penalty. Juror Hobart stated that she would have mixed emotions about returning a verdict of guilty if it required the death penalty and even if she found the appellant guilty as charged in the indictment. She further stated that she had mixed emotions about it, that she really did not believe in it and had a fixed opinion against it. Juror Brunson stated that she did not believe she could say kill the appellant if a verdict of guilty required the death penalty. Juror Gunn stated that he had a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty. Thus each juror indicated in one manner or another, by implication if not fact, that they would not return a verdict of guilty if such a verdict required the death penalty.

Finally, in an apparent abundance of caution, the trial judge asked the five jurors as a group if they would have an abiding conviction against assessing a guilty verdict if they were required to return a verdict of guilty which automatically fixed punishment at death.

True, no juror specifically stated or was specifically asked whether he could return a verdict of guilty which required the death penalty in spite of his convictions. However we think the unmistakable import and meaning of each colloquy and the supplemental questioning achieved this same result. Each juror's answers as a whole display an unequivocal reluctance to render a guilty

verdict, knowing that the defendant would be subjected to the death penalty. State v. Avery, 286 N. C. 459, 212 S. E. 2d 142 (1975), vacated in part on other grounds, ____ U. S. ____, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

In reviewing this matter we have not assumed the role of a lexicographer or a technician but have attempted to give the same meaning and substance to the colloquies as would a juror. Certainly, it cannot be said that these five jurors were excluded solely on the basis that they were opposed to the death penalty. If specifically asked, we have no doubt whatsoever that each juror would reply that he could not, in view of his fixed opinion against capital punishment, nevertheless consider the evidence and instructions of the court and return a verdict of guilty although that verdict could result in a death penalty, if he, being the trier of fact, was convinced of the guilt of the accused, and that the facts warranted a sentence of death. For these reasons, it is our conclusion that the trial judge did not err in excusing the five jurors for cause based upon their beliefs regarding capital punishment.

III

The appellant alleges that the Alabama Death Penalty Statute is an ex post facto law in its application to a defendant whose crime, which constitutes an aggravating circumstance under the statute, occurred before the statute became law. The Alabama statute became effective March 7, 1976. In May of 1969 the appellant was convicted of murder and given a life sentence.

The well settled weight of authority dictates that a statute providing that the punishment for an offender shall be increased if he has previously been convicted is not an ex post facto law because applied where the previous conviction or convictions took place before its enactment. Gryer v. Burke, 334 U. S. 728, 68 S. Ct. 1256, 92 L. Ed. 1689 (1948); Bailey v. State, 211 Ala. 667, 101 So. 546 (1924); and cases cited in 16A C. J. S. 161, Constitutional Law, §450, n. 52. Such statutes and other enhanced-sentence laws, including recidivist statutes, have been sustained on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws,

cruel and unusual punishment, due process, equal protection, and privileges and immunities. Spencer v. State of Texas, 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967); Moore v. State of Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301 (1895); McDonald v. Commonwealth of Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901); Graham v. State of West Virginia, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917 (1912); Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962).

Statutes which authorize the infliction of a more severe penalty on one who is a persistent offender

> "do not create or define a new, separate, distinct, independent or substantive offense. Further, the statutes do not inflict additional or further punishment for the commission of the prior offense, or offenses, or impose a new sentence for the prior offense, or operate in any way as punishment (for the prior offense), or affect the punishment inflicted therefor, or serve as a basis for trying accused again for that offense; the punishment is for the new crime only, or for only the last or latest offense committed." 24B C. J. S. 431-433, Criminal Law § 1958 (citations omitted).

Furthermore, unless provided by statute, in order to authorize the infliction of a more severe penalty on conviction for a second or a subsequent offense, it is not necessary that the first conviction, or other prior convictions relied on, should have occurred subsequent to the enactment of the statute. 24B C. J. S. 465, Criminal Law, § 1960(5)(a). Unless the statute fixes a maximum time limit within which the prior conviction shall have occurred, the remoteness of that prior conviction is immaterial. 24B C. J. S. 466, Criminal Law, § 1960 (5)(a).

Under the above authorities the trial court was correct in overruling the appellant's demurrer to the indictment presenting these grounds.

IV

The appellant maintains that since the jury in a capital case is only advisory and the judge must find the aggravating circumstances before sentencing a prisoner to die, there is no logical purpose for the statutory

requirement that the indictment allege the prior conviction or that the state be required to present proof of a prior conviction to a jury.

In Alabama, by statute, the aggravating circumstance must be alleged in the indictment where the death penalty is sought. Title 15, § 342(4), Code of Alabama 1940, Recompiled 1958, 1975 Interim Supplement, now § 13-11-2, Code of Alabama 1975. The aggravating circumstances must be set forth in the indictment because the state is required to give the accused notice that a greater penalty is sought to be inflicted than for a first offense. It is fundamental that the accused must be advised and informed of the nature and extent of the offense with which he is charged.

Under the Death Penalty Statute, the aggravating circumstance is a statutory element of the crime. Without it, one could not be charged and convicted for "capital murder". Though the opinion of the jury is advisory only upon the trial judge (see Jerry Wayne Jacobs v. State, 6 Div. 389 (Ala. Cr. App., Ms. July 2, 1977) at p. 44), the state must prove the aggravating circumstance and the jury must find the existence of such, even though the enhanced punishment is left to be imposed by the trial judge. By statute,

> "If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." Title 15, § 342(4), Code, 1975 Interim Supplement, now § 13-11-3, Code 1975. (Emphasis added)

Thus it is clear that the statutory scheme contemplates that the issue of the aggravation of the offense will be submitted to the jury. In the case under review, the state must establish beyond a reasonable doubt (1) the fact of the former conviction of murder in the twenty years preceding the crime (Title 15, § 342(4)(m), Code, 1975 Interim Supplement, now § 13-11-2(a)(13) Code 1975) or that the murder conviction carried a life sentence which the defendant was under at the time of the crime (Title 15, § 342(4)(f), Code, 1975 Interim Supplement, now § 13-11-2(a)(6), Code 1975) and (2) the fact of the identity of the accused as the person previously convicted.

Additionally, while the aggravated offense must be proved beyond

a reasonable doubt, and according to established rules of evidence, the aggravating circumstances which the trial judge must consider need not be admissible under the exclusionary rules of evidence. Title 15, § 342(5), Code, 1975 Interim Supplement, now § 13-11-3, Code 1975.

In Williams v. State, 239 Ala. 296, 297, 195 So. 213 (1940), the Alabama Supreme Court addressed this same criticism with regard to a death penalty statute (Title 14, § 319, Code of Alabama 1940). Although the jury fixed the punishment in that statute and does not in the present Death Penalty Statute, we think that the comments are applicable in this case.

> "It is further insisted this charge of being a life convict at the time when he is accused of murder in the first degree should not appear in the indictment to go to the jury, nor evidence in support thereof presented to the jury because of bias or prejudice aroused in the minds of the jury. It is suggested this matter should be brought to the attention of the court alone, and if found to be true, the jury be instructed to inflict the death penalty if found guilty of murder in the first degree. This suggestion should be addressed to the Legislature rather than the courts."

V

The appellant contends that the trial judge erred to a reversal in refusing to grant a pretrial psychiatric examination.

At the hearing on the motion of a psychiatric examination the appellant testified that he understood that he was in court to "stand trial on a murder case"; that "for the past ten or fifteen years, I've had a lot of blackouts, hallucinations, loss of memory - stuff like that"; that he did not recall any of the incidents that involved the murder; that he had never been under medical treatment for any type of mental illness; and that he was thirty-eight years old and had spent twenty-one or twenty-two years in prison.

Cross examination of the appellant revealed that he had escaped from the Georgia State Penitentiary when he was arrested on the present charge; that he had never gone to see a psychiatrist and had not served in the armed forces. No other evidence was presented at the hearing or at trial with regard to the appellant's competency or sanity.

In Robinson v. State, Ala. Cr. App., 337 So. 2d 1386 (1976), this court stated:

> "A defendant has no right to receive a mental examination as to his sanity whenever he requests one and absent such a right, the trial court is

the screening agent as to such request. Pace v. State, 284 Ala. 585, 226 So. 2d 645."

On a hearing of a motion for a sanity or competency investigation, the defendant has the burden of persuasion. Minniefield v. State, 47 Ala. App. 699, 260 So. 2d 607 (1972). From the record we are given no cause to doubt the appellant's sanity or competency to stand trial. The trial judge observed his demeanor and manner of testifying and was therefore in a much better position to rule on the motion. We find no abuse of his discretion in denying that motion. Additionally we note that there was no plea of not guilty by reason of insanity filed to the indictment.

VI

Finally the appellant alleges that the court erred in failing to give the following requested charge when the oral charge of the court did not cover its subject matter and the requested charge was a correct statement of law. The requested charge reads:

> Defendant's Requested Charge Number 9.
> "The Court charges the jury that, as a matter of law, that, where a conviction for a criminal offense is sought upon circumstantial evidence alone, the state must not only show by a preponderance of the evidence and beyond a reasonable doubt, that the alleged facts and circumstances are true, but that must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused."

In Dutton v. State, 25 Ala. App. 472, 475, 148 So. 876 (1933), this charge was held to be a correct statement of the law citing Everett v. People, 216 Ill. 473, 75 N. E. 188, as the leading supporting authority. However in Mitchell v. State, 114 Ala. 1, 22 So. 71 (1896), a charge which instructed the jury that before there can be a conviction on circumstantial evidence,

> "the facts and circumstances must be such as are absolutely incompatible upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused", (Emphasis added)

was held to be an improper and incorrect statement of the law.

"The court properly refused to give each of the charges requested by the defendant. They exacted too high a measure of proof, and were calculated to confuse the jury. Dorsey v. State, 110 Ala. 38; Buchanan v. State, 109 Ala. 7; Webb v. State, 106 Ala. 52, and authorities cited. Besides, the true test of the sufficiency of circumstantial evidence to justify a conviction is, whether the circumstances as proved produce a moral conviction to the exclusion of every reasonable doubt. It is not necessary for the circumstances to be 'such as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused'. Bland v. State, 75 Ala. 574; Banks v. State, 72 Ala. 522; Matthews v. State, 55 Ala. 65." Mitchell, supra, 114 Ala. 6.

We deem the Mitchell case to be the better reasoned authority and controlling. It contains the correct statement of law, Dutton, to the contrary. To the extent to which the holding in Dutton conflicts with our present ruling, it is expressly overruled.

Additionally the refused requested charge was fully, adequately and substantially covered in the other requested charges given by the trial judge. For this reason alone the refusal of the requested charge was not error. Elston v. State, 56 Ala. App. 299, 321 So. 2d 264 (1975); Hicks v. State, 46 Ala. App. 125, 238 So. 2d 922 (1970); White v. State, 42 Ala. App. 249, 160 So. 2d 496 (1964).

We have searched the record for error and have written to every issue presented by the appellant on the appeal. It is our conclusion that this case is due to be affirmed.

AFFIRMED.

All Judges concur.

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1978-79

Ex parte: Thomas Milton Wilson

Petition for Writ of Certiorari
to the Court of Criminal Appeals

77-433 (In re: Thomas Milton Wilson

v.

State of Alabama)

MADDOX, JUSTICE.

WRIT QUASHED AS IMPROVIDENTLY GRANTED.

Torbert, C. J., Bloodworth, Faulkner, Jones, Shores, Embry and Beatty, JJ., concur.

9 Feb. 79

APRIL 20, 1979

THE STATE OF ALABAMA - - - - - - - - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1978-79

77-433

EX PARTE: THOMAS MILTON WILSON
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Thomas Milton Wilson vs. State of Alabama)

ORDER

WHEREAS, on May 23, 1978, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure.

WHEREUPON, come the parties and the Petition for Writ of Certiorari to the Court of Criminal Appeals being argued and submitted and duly examined and understood by the Court, IT IS CONSIDERED AND ORDERED as follows:

(1) That the application for rehearing filed in this cause on February 21, 1979, be, and the same is hereby, granted.

(2) That the order entered on February 9, 1979, be, and the same is hereby, set aside.

(3) That the judgment of the Court of Criminal Appeals be, and the same is hereby affirmed. NO COSTS TAXED.

J.O. Sentell, Clerk of the Supreme C... of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 11th day of ...

J.O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX A-3

P. O. BOX 157
MONTGOMERY, ALABAMA 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

June 22, 1979

Re: 77-433
EX PARTE: THOMAS MILTON WILSON
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Thomas Milton Wilson vs. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

J. D. Sentell
Clerk, Supreme Court of Alabama

APPENDIX A-4

CHAPTER 11.

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

Cross references. — As to bail for persons charged with capital offenses, see § 15-13-3. As to mental examination of defendants in capital cases, see § 15-16-22. As to suspension of death sentence upon finding of insanity after conviction and sentence, see § 15-16-23. For additional provisions as to death penalty, see § 15-18-80 et seq. As to pardon or parole of person having death sentence commuted to life imprisonment, see § 15-22-27.

Sec.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.
13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.
13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.
13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.
13-11-5. Conviction and sentence of death subject to automatic review.
13-11-6. Aggravating circumstances.
13-11-7. Mitigating circumstances.
13-11-8. Appointment of experienced counsel for indigent defendants.
13-11-9. Effective date.

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal

knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as

heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

Cross references.—As to automatic appeal from death sentence generally, see § 12-22-150. As to affirmation of judgment of court in capital cases, see § 12-22-213.

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

Cross reference. — As to defense of indigents generally, see § 15-12-1 et seq.

§ 13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

Supreme Court, U.S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5301

THOMAS MILTON WILSON,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

CHARLES A. GRADDICK
Alabama Attorney General

CHARLES LAWSON LITTLE
Assistant Alabama Attorney General

JEAN WILLIAMS BROWN
Assistant Alabama Attorney General

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
TABLE OF CASES	ii
QUESTIONS PRESENTED	iv
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. BY LIMITING THE JURY'S DECISION TO "NOT GUILTY" OR "DEATH" THE ALABAMA DEATH PENALTY STATUTE DOES NOT PROMOTE ARBITRARY & CAPRICIOUS DECISIONS	6
II. THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES	7
III. THE ALABAMA DEATH PENALTY STATUTE PROVIDES FOR AUTOMATIC APPELLATE REVIEW OF SENTENCING	18
IV. THE EXCLUSION OF PROSPECTIVE JURORS WAS PROPER WHERE JURORS MADE IT UNMISTAKABLY CLEAR THAT THEIR ATTITUDE TOWARD THE DEATH PENALTY WOULD PREVENT THEM FROM RENDERING AN IMPARTIAL VERDICT AS TO THE DEFENDANT'S GUILT	26
CONCLUSION	31
CERTIFICATE OF SERVICE	32

TABLE OF CASES

PAGE

Ashlock v. State,
Ala. Cr. App., 367 So. 2d 560 (1979)..... 20,21

Baldwin v. State,
Ala. Cr. App., 372 So. 2d 26 (1978),
___So. 2d ___(1979)..... 13

Beck v. State,
Ala. Cr. App., 365 So. 2d 985 (1978),
Ala., 365 So. 2d 1006 (1978)..... 16,22,23,25

Boulden v. Holman,
394 U.S. 478, 89 S. Ct. 1138,
22 L. Ed 2d 433 (1969)..... 26

Brown v. Ohio, 432 U.S. 161 (1977)..... 12

Clements v. State,
Ala. Cr. App., 370 So. 2d 708 (1978), rev'd on
other grounds Ex Parte Roy Frank Clements, Ala.
370 So. 2d 723 (1979)..... 23,24,25

Cook v. State,
Ala. Cr. App., 369 So. 2d 1243 (1978), Ala.,
369 So. 2d 1251 (1978)..... 11,12,16,19,20

Evans v. State,
Ala. Cr. App., 361 So. 2d 654,
Ala., 361 So. 2d 666 (1978)..... 19

Evans v. State,
Ala. Cr. App., 362 So. 2d 1284 (1978)..... 19

Gardner v. Louisiana, 368 U.S. 157 (1961)..... 12,18

Gregg v. Georgia, 428 U.S. 153 (1976)..... 6,17,18,24

Edward Horsley v. State,
___So. 2d ___(Ala. Cr. App., October 3, 1978)..... 13
Ala.___So. 2d___(1978)

J.B. Hubbard v. State,
___So. 2d___, (Ala. Cr. App., May 1, 1979)..... 21

Jacobs v. State,
Ala. Cr. App., 361 So. 2d 607 (1977), Ala.,
361 So. 2d 640 (1978)..... 10,11,14,22,23,
24,25

Jurek v. Texas,
428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed 2d 929 (1976)... 5,18

TABLE OF CASES (CONTINUED)

PAGE

Lockett v. Ohio,
____U.A.____, 98 S. Ct. 2954 (1978)..... 5,7,9,10,11,12

Willie Lewis Mack v. State,
____So. 2d____, (Ala. Cr. App., July 25, 1978)..... 12,21

Neal v. State,
Ala. Cr. App., 372 So. 2d 1331 (1979)..... 13,19,23

Proffitt v. Florida,
428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed 2d 913 (1976)... 5,6,9,17,18

Pugh v. Rainwater,
572 F. 2d 1053 (5th Cir. 1978)..... 17

Herbert Lee Richardson v. State,
____So. 2d____ (Ala. Cr. App. October 3, 1978)..... 12,21,22,23

Spinkellink v. Wainwright,
578 F. 2d 582 (5th Cir. 1978)..... 15,17

State v. Avery,
286 N.C. 459, 212 So. Ed 2d 142 (1975),
____U.S.____, 96 S. Ct. 3209, 49 L. Ed 2d 1209 (1976).. 31

State v. Dixon, 382 So. 2d 1..... 15

Roger Scott Thomas v. State,
____So. 2d____, (Ala. Cr. App., March 27, 1979)..... 23

Universal Amusement Co. v. Vance,
587 F. 2d 159 (5th Cir. 1978)..... 17

Wilson v. State,
Ala. Cr. App., 371 So. 2d 932 (1978), Ala., 371 So.
2d 943 (1979)..... 1

Witherspoon v. Illinois,
391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776 (1968)... 26

Woodrow Wilson Keller, Jr. v. State,
____So. 2d___, (Ala. Cr. App. Feb. 20, 1979)..... 20

Youngblood v. State,
Ala. Cr. App., 372 So. 2d 34 (1979)..... 19

QUESTIONS PRESENTED

I.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PROMOTES ARBITRARY AND CAPRICIOUS DECISIONS BY LIMITING THE JURY'S DECISION TO "NOT GUILTY" OR "DEATH".

II.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

III.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PROVIDES FOR AUTOMATIC APPELLATE REVIEW OF SENTENCING.

IV.

WHETHER THE EXCLUSION OF PROSPECTIVE JURORS WAS PROPER WHERE JURORS MADE IT UNMISTAKABLY CLEAR THAT THEIR ATTITUDE TOWARD THE DEATH PENALTY WOULD PREVENT THEM FROM RENDERING AN IMPARTIAL VERDICT AS TO THE DEFENDANT'S GUILT.

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1979

NO._____

THOMAS MILTON WILSON,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION
TO PETITION FOR WRIT OF
CERTIORARI

BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the petitioner's conviction and sentence is reported as Wilson v. State of Alabama, Ala. Cr. App., 371 So. 2d 932 (1978).

The Writ of Certiorari to the Alabama Court of Criminal Appeals was granted by the Supreme Court of Alabama on May 23, 1978, but was quashed as being improvidently granted on February 9, 1979. The application for rehearing was subsequently granted and the order of February 9, 1979, was set aside. In the same order the Supreme Court of Alabama affirmed the judgment of the Alabama Court of Criminal Appeals without an opinion. The petition for rehearing was denied on June 22, 1979. Said decisions are reported as Wilson v. State, Ala. Cr. App., 371 So. 2d 932 (1978), Ala., 371 So. 2d 943 (1979).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, §13-11-1, et seq.

Alabama Rules of Appellate Procedure, Rule 39(c)

STATEMENT OF THE CASE

Petitioner, Thomas Milton Wilson, was indicted under Code of Alabama 1975, §13-11-1, et. seq. by the Mobile County Grand Jury on June 10, 1977. After being determined to be indigent by the court, the petitioner, with his appointed counsel present, was arraigned. He was charged in paragraph one of the indictment with murder committed while under a life sentence in prison, and in the second paragraph with murder while having been convicted of murder in the first or second degree in the twenty years preceding the crime.

During the course of qualifying the jurors, Petitioner's counsel objected to the questions asked by the trial court to the jurors eliciting their opinions concerning the death penalty, and to the exclusion by the court of certain jurors who had expressed their opposition to the death penalty. (R. 41-51). Petitioner contended that the questions and the exclusion of the jurors denied him rights secured by the Fourteenth Amendment to the Constitution of the United States. This question was presented to both the Alabama Court of Criminal Appeals and the Alabama Supreme Court for review.

The charge against the petitioner was based on the shooting of one Joe Gilliland in the house trailer of Mary Helen Leonard. After Mrs. Leonard and the petitioner had returned to the trailer one evening, Mrs. Leonard went into her bedroom while the petitioner waited in the dining room. Gilliland, who was renting a room from Mrs. Leonard, was apparently in another bedroom. Mrs. Leonard and her two sons then heard shots. Gilliland was found dead and the petitioner was seen driving away in an automobile. There were no eye witnesses to the shooting. The petitioner was subsequently arrested with certain identification records belonging to the deceased. The state sought to prove a prior murder conviction in Georgia for which the petitioner

was given life (R. 169-172). The trial began on July 20, 1977. On July 21, 1977, the jury entered its verdict finding the petitioner guilty of capital murder and fixing his punishment at death by electrocution. (R. 8). On July 22, 1977, after hearing evidence offered by the district attorney as to petitioner's prior record, and a statement from the petitioner as to the invalidity of at least one of those charges, the trial court entered its order finding the petitioner guilty of capital murder and sentencing him to death by electrocution. (R. 18-23). Petitioner's motion for new trial in which the constitutionality of the statute was raised was denied. (R. 29-30).

The Alabama Court of Criminal Appeals affirmed the conviction finding that the statute was constitutional in all respects. The court further found that there had been no constitutional violation by the questioning or exclusion of jurors concerning the death penalty. After an initial grant of certiorari by the Alabama Supreme Court and subsequent quashing of the grant of the writ, the petitioner's writ of certiorari was granted and the judgment of the trial court affirmed without written opinion.

Petitioner is presently incarcerated in Holman Prison at Atmore, Alabama, and has been incarcerated since his arrest in 1976.

SUMMARY OF ARGUMENT

The Alabama death penalty statute does not promote arbitrary and capricious decisions by the jury by limiting the jury's decision to "not guilty" or "death." A guilty verdict is only the first of two steps and it is in the second step, the sentencing hearing before the judge, that the defendant's punishment is set. The requirement that the jury return a guilty verdict which fixes the punishment at death serves to impress upon jurors the importance of their task, thus emphasizing the need for accurate, impartial fact finding. The Alabama statute also avoids the problem of de facto sentencing discretion through jury nullification by precluding consideration of mitigating circumstances at the time the verdict is rendered.

The Alabama statute allows the judge, as the sentencing authority, to consider at the sentencing hearing any evidence which tends to show that the death penalty is not appropriate in a given case. The Supreme Court of Alabama has interpreted the statute to allow the sentencing judge to hear the broadest possible range of evidence and argument in mitigation. This interpretation is authoritative and satisfies the requirements of Lockett v. Ohio, Proffitt v. Florida, and Jurek v. Texas.

Appellate review of Alabama death penalty cases is sufficient to ensure consistency and prevent arbitrariness and capriciousness. All capital cases in which the death penalty is imposed at the trial court level are automatically appealed to and reviewed by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

Finally, the trial court was correct in excluding prospective jurors who made it unmistakably clear that their attitude toward the death penalty would prevent them from rendering an impartial decision as to the defendant's guilt.

ARGUMENT

I.

THE ALABAMA DEATH PENALTY STATUTE DOES NOT PROMOTE ARBITRARY AND CAPRICIOUS DECISIONS BY THE JURY BY LIMITING THE JURY'S DECISION TO "NOT GUILTY" OR "DEATH."

The Petitioner suggests that by requiring the jury to either acquit or to impose the death penalty without consideration of any mitigating factors, the Alabama death penalty statute promotes arbitrary and capricious imposition of the death penalty.

However, in Gregg v. Georgia, 428 U.S. 153, 49 L. Ed 2d 859 (1976), the Court upheld the Georgia death penalty statute because it was determined that that statute satisfied the requirement that the discretion to impose the death penalty "be suitably direct and limited so as to minimize the risk of wholly arbitrary and capricious action." Under the Georgia statute, mitigating circumstances are not considered by the jury at the time the verdict of guilt or innocence is rendered. To the contrary, the statute is similar to the Alabama death penalty statute in that mitigating circumstances do not come into play until the defendant has been found to be guilty of the offense charged.

Similarly, under the Florida statute which was upheld in Proffitt v. Florida, 428 U.S. 242, 49 L. Ed 2d 913 (1976), mitigating circumstances are not taken into consideration until after the defendant has been found guilty.

Moreover, while Petitioner states that the Alabama statute puts the jury under overwhelming pressure, the Respondent submits that the requirement that the jury return a guilty verdict which fixes the punishment at death serves to impress upon jurors the importance of their task, thus emphasizing the need for accurate, impartial fact finding.

Based upon prior decisions by this Court it is clear that mitigating circumstances need be considered only when the defendant is being sentenced by the sentencing authority. Hence, the Alabama statute is constitutional.

II.

THE STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES

In Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978), a plurality of the United States Supreme Court held that:

> ...we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (footnotes omitted).

A statutory system that permitted broad consideration of mitigating factors was deemed necessary because:

> ...a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. ... 98 S.Ct. at 2965.

The opinion further stated that in order to meet constitutional requirements, a state death penalty must not preclude consideration of relevant mitigating factors. Lockett v. Ohio, 98 S. Ct. at 2967.

The Alabama statutory sentencing procedure in capital cases, as construed by the Alabama Supreme Court, does not run afoul of the requirements laid down by the plurality opinion in Lockett v. Ohio, supra. As required in that

opinion, the Alabama sentencing procedure allows the sentencing authority to consider as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

Under Alabama's death penalty act, if the jury finds the defendant guilty, the trial judge is requried to hold a separate sentence hearing for the purpose of determining the appropriate punishment for that specific case. Code of Alabama 1975, § 13-11-3. The statute states that the purpose of this sentence hearing is, "... to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." At the sentence hearing, the sentencing authority is in no way precluded from hearing all evidence showing relevant mitigating factors, because the statute itself provides that: "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." Code of Alabama 1975, § 13-11-3 (emphasis added).

Alabama's death penalty statute further provides that any evidence which the trial court deems to have probative value may be received. Section 13-11-3. As the statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, or any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

The case of Proffitt v. Florida, 428 U.S. 242 (1976), likewise demonstrates the constitutionality of Alabama's sentencing provision. The Florida statutory provision, which was upheld in Proffitt, supra, Fla. Stat. Ann. §921.141(6) entitled MITIGATING CIRCUMSTANCES, provides that "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. The Alabama provision, Code of Alabama 1975, §13-11-7, entitled MITIGATING CIRCUMSTANCES, provides that, "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. Not only is the introductory language in these two corresponding provisions identical, but the actual mitigating circumstances themselves in the Florida and Alabama statutes are verbatim identical.

In distinguishing the Florida statute which was upheld in Proffitt v. Florida, supra, from the Ohio statute which was struck down in Lockett v. Ohio, supra, the Lockett plurality observed:

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ... 98 S. Ct. at 2965-2966.

The essence of petitioner's argument in the present case is that that assumption cannot be made about Alabama's death penalty statute. Petitioner's argument is that in Alabama the sentencing authority can only consider those mitigating circumstances which are set out in Code of Alabama 1975, § 13-11-7 in determining whether a sentence of death should be imposed on a particular defendant. Petitioner's argument is that since section 13-11-4 requires that the sentencing authority must weigh the

mitigating circumstances which are enumerated in section 13-11-7, and since that section says that certain considerations "shall be" the mitigating circumstances, then the sentencing authority is limited in considering the mitigating factors.

Petitioner's argument ignores the provisions of section 13-11-3, which were quoted on page 8 of this brief, above. Even more importantly, petitioner's argument ignores the construction and interpretation which have been given the statutory provisions by the Alabama Supreme Court.

The construction and interpretation which have been given to the relevant statutory provisions by the Alabama Supreme Court make it clear that this Court need not depend upon any assumptions about the matter. No assumption is necessary, because the Alabama Supreme Court has explicitly ruled that the statutory mitigating factors set out in the Alabama death penalty statute are not exclusive.

Jacobs v. State, 361 So.2d 640 (Ala. 1978), was the first case which the Alabama Supreme Court decided concerning the Alabama death penalty statute. After the Alabama Supreme Court had issued its opinion in that case, the United States Supreme Court handed down its decision in Lockett v. Ohio, 98 S.Ct. 2954 (1978). Jacobs then asked the Alabama Supreme Court to reconsider its decision in his case in light of the Lockett v. Ohio, supra, decision. In considering and denying Jacobs' application for a rehearing, the Alabama Supreme Court had an opportunity to interpret and construe the sentencing provisions of the Alabama death penalty statute in light of the United States Supreme Court holding in Lockett v. Ohio, supra. The Alabama Supreme Court extended its original opinion in Jacobs v. State, 361 So.2d at 652-654, and in doing so held as follows:

> We deny petitioner's application to rehear this case but we point out that we have examined the cases of Bell v. Ohio, ___ U.S. ___, 98 S.Ct. 2297, 57 L.Ed. 2d 1010 and Lockett v. Ohio, U.S. ___, 98 S. Ct. 2954, 57 L.Ed. 2d 973, decided after petitioner's application for a rehearing was filed, and we conclude that those cases do not invalidate Alabama's sentencing scheme in death cases. Alabama's sentencing scheme specifically provides, in part:
>
> "...In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and it shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. ... (Emphasis added) (§ 13-11-3, Code, 1975)."

The Alabama Supreme Court itself added the emphasis to that part of the statute. In view of that provision of the statute, the Alabama Supreme Court, on rehearing, concluded:

> It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances, and does not contain the deficiencies the court found were inherent in Ohio's scheme. (Emphasis in original.)

This interpretation and construction of the sentencing provisions in Alabama's death penalty statute was reaffirmed in Ex Parte: Recardo Cook, Ala., 369 So.2d 1251 (1978). In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court remanded the case to the trial court for another sentencing hearing, because the one which had been conducted did not comport with the requirements outlined in Lockett v. Ohio, supra, and Jacobs v. Alabama, supra. The Alabama Supreme Court recognized, based upon the plurality's opinion in Lockett the necessity of the sentencing authority considering any relevant aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death. In remanding for a new sentence hearing in Ex Parte: Recardo Cook, the Alabama Supreme Court stated:

> Lockett was not released until after this court upheld Alabama's Death Penalty Act in Jacobs v. State. Nevertheless, on rehearing in Jacobs we considered the possible impact of Lockett on Alabama's statute. In an extended opinion we noted that Lockett does not invalidate Alabama's sentencing scheme in death cases since §13-11-3, Code of Alabama 1975, specifically allows any relevant evidence in mitigation to be presented at the sentencing hearing....

Therefore, the Alabama Supreme Court has construed Alabama's sentencing scheme in capital cases to allow the sentencing authority to consider any relevant evidence in mitigation, and this complies with the holding in Lockett v. Ohio, supra.

Because the Alabama Supreme Court has interpreted Alabama's death penalty statute to permit consideration at the sentence hearing of non-statutory mitigating circumstances, that settles the matter. The Alabama Supreme Court and not petitioner is the authoritative source for the proper construction and interpretation of the Alabama death penalty statute. E.g., Brown v. Ohio, 432 U.S. 161 (1977); Garner v. Louisiana 368 U.S. 157 (1961).

Because the sentencing determination under Alabama's statute includes non-statutory mitigating circumstances, the Alabama Supreme Court has instructed trial court judges, who are the sentencing authorities, to have as much information about a defendant as possible. In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court stated:

> In conducting these hearings trial judges should keep in mind their ability to order pre-sentence investigations and psychiatric evaluations to obtain a full picture of the defendant.

The Alabama Court of Criminal Appeals has gone even further. In remanding cases for new sentence hearings, that Court has twice required trial court judges to order a pre-sentence report to be made and considered. Willie Lewis Mack v. State, ___ So.2d ___ (Ala. Cr. App. July 25, 1978) Ms. Op. 46; Herbert Lee Richardson v. State, ___ So.2d ___ (Ala. Cr.

App. October 3, 1978), Ms. Op. at 33.

Not only has the Alabama statute been interpreted by the Alabama appellate courts to allow consideration of non-statutory mitigating circumstances, but trial court judges have actually administered it in such a fashion. In Brian Keith Baldwin v. State, Ala. Cr. App., 372 So.2d 26 (1978), Ala., ___ So.2d ___ (1979), the Alabama Court of Criminal Appeals noted with approval that at the sentence hearing in that case, "The appellant was given the opportunity to present any mitigating circumstance which he desired to the trial court." The Court noted the same thing in Edward Horsley v. State, ___ So.2d ___ (Ala. Cr. App. October 3, 1978) Ala., ___ So.2d ___ (1979) Ms. Op. at 22.

Eddie Barnard Neal v. State, Ala. Cr. App., 372 So.2d 1331 (1979), is a case in which the trial court judge not only considered a non-statutory mitigating circumstance but gave significant weight to it in sentencing the defendant to life without parole. After setting out some statutory mitigating factors he found to be present in the case, the trial court judge listed and considered the following non-statutory mitigating circumstance:

> While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this Court must insist upon for the penalty of death to be invoked.

In summary, the Alabama death penalty statute expressly permits a trial court judge to consider any matter that he deems relevant to sentencing. The statute, as interpreted by the Alabama Supreme Court, does not prohibit a trial court judge from considering non-statutory mitigating circumstances. The Alabama appellate courts have instructed trial court judges to consider any and all evidence that is relevant to mitigation of the crime. Trial court judges have given convicted defendants the opportunity to present any relevant evidence in mitigation.

THE BURDEN OF PROOF AND PERSUASION IN SENTENCING

Under Alabama's death penalty statute, the state has the burden of proving at least one aggravating circumstance. Under Code of Alabama 1975, §13-11-4(1), unless at least one aggravating cicumstance is proven the death penalty cannot be imposed. Jacobs v. State, Ala. Cr. App., 361 So. 2d 607 (1977), Ala., 361 So. 2d 640 (1978) ("If the trial judge, in his written findings, determines that one or more aggravating circumstances attended the offense charged, then, and only then, can he impose the death sentence.") The state can and often will prove more than one aggravating circumstance, but it must prove at least one or there will be a sentence of life without parole.

Because of the way in which the definitions of the substantive capital offenses overlap with the list of aggravating circumstances, the state must in all or virtually all cases prove the existence of at least one aggravating circumstance beyond a reasonable doubt and to a moral certainty. The definitions of capital crimes are set out in section 13-11-2(a). The list of aggravating circumstances is contained in section 13-11-6. They overlap almost completely. For example, in proving a defendant guilty beyond a reasonable doubt and to a moral certainty of any of the four capital crimes defined in section 13-11-2(a) (1) - (4), the state will have established beyond a reasonable doubt and to a moral certainty the existence of the aggravating circumstance listed in section 13-11-6(4).

The same is true of the remaining capital offenses defined in the statute. If the state does not prove them beyond a reasonable doubt, then there will be an acquittal. If the state does prove any of them sufficiently to get a conviction,

then that same proof will almost certainly establish at least one and often more than one of the aggravating circumstances beyond a reasonable doubt. It is possible to strain the imagination and conjure up a theoretically possible case in which there is not a factual overlap between the capital offense proven and at least one of the aggravating circumstances but this Court's inquiry should be based on reality instead of conjecture and speculation. The reality is that in proving a defined capital offense beyond a reasonable doubt the state will prove beyond a reasonable doubt an aggravating circumstance. That is all the Constitution requires.

Support for this manner of approaching and resolving the issue is found in Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978). In that case, petitioner argued that Florida's statute was unconstitutional because it did not require proof beyond a reasonable doubt of aggravating circumstances. While not holding that such a standard of proof was constitutionally required, the Fifth Circuit Court of Appeals held that it was provided in any event by the overlap of the Florida statute's definitions of capital offenses with its list of aggravating circumstances. The Fifth Circuit opinion in Spinkellink v. Wainwright, 578 F. 2d at 610, quotes and relies upon the following passage from the Florida Supreme Court's decision in State v. Dixon, 283 So. 2d 1, 9:

> "The aggravating circumstances of Fla. stat. §921.14(6) [sic], F.S.A., actually define those crimes--when read in conjunction with Fla. Stat. §§782.04(1) and 794.01(1), F.S.A. -- to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury."

The same is true of Alabama's statute, and the result should

be the same also.[1] This Honorable Court need not determine whether it is constitutionally necessary that at least one aggravating circumstance be proven beyond a reasonable doubt before a defendant can be sentenced to death. Such a determination is unnecessary, because the structure of Alabama's statute ensures that such will be the case.

Under Alabama's statute, after the state has established one or more aggravating circumstances, the defendant and his attorney have a full and fair opportunity to rebut the evidence presented concerning aggravating circumstances and to present any evidence or make any arguments concerning mitigating circumstances. Section 13-11-2; Beck v. State, Ala. Cr. App., 365 So. 2d 985 (1978), Ala. 365 So. 2d 1006 (1978). This might be construed as a shift in the burden of going forward once the state has established one or more aggravating circumstances, but it does not mean that unless the defendant proffers a mitigating circumstance none will be considered.

Once the sentence hearing has been held the trial court judge, as the sentencing authority, must weigh the aggravating circumstances found against the mitigating circumstances. This weighing process is not a task which lends itself to formalistic rules. As the Alabama Supreme Court noted in Ex Parte: Recardo Cook, 369 So. 2d 1251 (1978) (plurality opinion):

> Once all of the proper evidence has been received at the sentencing hearing and arguments have been given the trial judge must

---

[1]The analogy between Alabama's statute and Florida's statute on this point is particularly apt, because the eight aggravating circumstances in Florida's statute are identical except for a minor difference to the eight aggravating circumstances in Alabama's statute. Compare Section 13-11-6 of Alabama's statute with the relevant part of Florida's statute which is quoted in Proffitt v. Florida, 428 U.S. at 248, n. 6. The only difference is that Alabama's fourth aggravating circumstance omits arson, aircraft piracy, and bombing.

> "weigh the aggravating and mitigating circumstances" and sentence the defendant to death or life imprisonment without parole. §13-11-4, Code of Ala. 1975. This "balancing" should not, however, be construed to authorize a "tallying" of items for and against the defendant. We can readily envision situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty. In conducting these hearings trial judges should keep in mind their ability to order presentence investigations and psychiatric evaluations to obtain a full picture of the defendant.

No court has ever held that the sentencing authority must apply a particular standard of persuasion to the sentence decision itself. The Fifth Circuit did not so hold in Spinkellik v. Wainwrig't, supra. The United States Supreme Court has never so held. The statutes it upheld in Gregg v. Georgia, supra, and Proffitt v. Florida, supra, did not so provide.

If it is ever held that the sentencing decision itself must be made in light of some particular standard of persuasion applied in the sentencing authority's mind, then Alabama's death penalty statute can be so interpreted. See e.g., Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc); Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc). For now, it should suffice that under any conceivable standard petitioner was deserving of the death penalty, and no reasonable unbiased person could conceivably have decided the matter differently than the trial court judge in petitioner's case.

In summary, because of the manner in which Alabama's death penalty statute is drafted, in order to reach the

sentencing phase in a case the state will necessarily have had to prove beyond a reasonable doubt at least one aggravating circumstance. If it is ever held to be constitutionally necessary to apply any particular standard of persuasion to the sentencing decision itself, then Alabama's statute can be so interpreted. For purposes of the present case, the sentencing determination involving petitioner was clearly correct under any standard.

III.

APPELLATE REVIEW OF ALABAMA DEATH PENALTY CASES IS SUFFICIENT TO ENSURE CONSISTENCY AND PREVENT ARBITRARINESS AND CAPRICIOUSNESS.

The United States Supreme Court has noted the constitutional value of state appellate court review of sentencing decisions in capital cases as a means of ensuring consistency and preventing arbitrariness and capriciousness. Gregg v. Georgia, 428 U.S. 153, 198, 204-207 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); 428 U.S. at 211-212, 222-224 (concurring opinion by White, J., joined by Burger, C.J., and Rehnquist); Proffitt v. Florida, 428 U.S. 242, 251, 258-259 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); Gardner v. Florida, 430 U.S. 349, 361 (plurality opinion). Whether appellate review of sentencing decisions in capital cases is constitutionally necessary is uncertain. From a portion of the opinion in Gardner v. Florida, 430 U.S. at 361, it would appear to be. However, the United States Supreme Court opinion in Jurek v. Texas, 428 U.S. 262 (1976), which upheld the constitutionality of the Texas capital punishment statute is conspicuously silent on the question of appellate review of sentencing decisions. In any event, Alabama has a careful system of appellate review of death sentences which ensures that the death penalty will not be inflicted arbitrarily or capriciously under its statute.

All capital cases in which the death penalty is imposed at the trial court level are automatically appealed to and reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Capital cases in which the defendant was convicted and received a sentence of life without parole are appealed to and reviewed by the appellate courts only if the defendant elects to do so. Some do. E.g., Eddie Barnard Neal v. State, Ala. Crim. App., 372 So. 2d 1331 (Ala. Cr. App. May 1, 1979); Roosevelt Youngblood v. State, Ala. Cr. App., 372 So. 2d 34 (1979); Leslie Evans v. State, Ala. Cr. App., 363 So. 2d 1283 (1978).

In Alabama, appellate review of sentencing in capital cases involves three functions or inquiries: (1) review of the sentencing process in the trial court to ensure that the sentence hearing was conducted properly, that complete written findings were entered, and that statutory provisions concerning aggravating and mitigating circumstances at the appellate level; and (3) comparative appellate review of the sentence result with the result in other capital cases. All three of these types of appellate review serve to ensure, either directly or indirectly, that capital sentencing in Alabama is not arbitrary or capricious.

Alabama appellate courts meticulously search the record in capital cases to ensure that the sentencing process was conducted properly. In Remanding for a new sentence hearing in Ex Parte: Recardo Cook, Ala., 369 So. 2d 1251 (1978) (plurality

opinion), the Alabama Supreme Court noted, "...it is the duty of this court to ensure that no error has tainted the trial or the sentencing process." Alabama's appellate courts have diligently discharged that duty.

Consistency in the application of the death penalty is served by the uniform interpretation and application of statutory provisions concerning aggravating and mitigating circumstances. Alabama's appellate courts have sought to ensure such consistency by reversing sentences of death and remanding cases for new sentence hearings and determinations where trial courts have misapplied or misinterpreted aggravating and mitigating circumstances. Examples of cases involving sentences of death which were remanded for new sentence hearings and determinations for that reason include Ex Parte: Recardo Cook, supra; Woodrow Wilson Keller, Jr. vs. State, ___So. 2d___ (Ala. Cr. App. Feb. 20, 1979); See also, Ashlock v. State, Ala. Cr. App., 367 So. 2d 560, 561 (1979). In Woodrow Wilson Keller, Jr. v. State, supra, Ms. Op. at 17, the Alabama Court of Criminal Appeals strongly admonished trial courts against any inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute.

Alabama's appellate courts have also insisted that trial court judges fully comply with the requirement of Code of Alabama 1975, §13-11-4 that complete written findings of fact from the trial and sentence hearing be entered before a capital sentence is pronounced. Cases which have been remanded for a new sentence hearing because complete written findings were not entered in the original sentence determination include

J. B. Hubbard v. State, ___So. 2d ____(Ala. Cr. App. May 1, 1979); Willie Lewis Mack v. State, ___So. 2d___ (Ala. Cr. App. July 25, 1978); Herbert Lee Richardson v. State, ___So. 2d ___(Ala. Cr. App. Oct. 3, 1978); See also, Ashlock v. State, supra.

Requiring that a proper sentence hearing be held and that complete written findings be entered serves the goal of consistency in application of the death penalty. It does so, because it makes appellate review of the substantive sentencing decision itself possible. The Alabama Court of Criminal Appeals explicitly recognized this in remanding for a new sentence hearing in Willie Lewis Mack v. State, supra, Ms. Op. at 46, where it stated:

> The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done, "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."
>
> Prior to the date set for the hearing the trial court shall order a pre-sentence report and furnish the defendant and his attorney with a copy of same. The defendant must be afforded the opportunity to adduce any testimony which has any probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live ot die is not to be treated as a mere formality. (Emphasis added.)

See also, Herbert Lee Richardson v. State, supra, Ms. Op. at 32-33.

The purpose of the requirement that complete written findings be made in any sentence determination is to facilitate appellate review of the appropriateness of any sentence of death. Jacobs v. State, 361 So. 2d 640, 646-647 (Ala. 1978) (separate opinion by Chief Justice Torbert). Mandatory appellate review, provided by Code of Alabama 1975, §13-11-5 and Alabama Rule of Appellate Procedure 39(c), is also important. As Chief Justice Torbert has noted, "This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found to be appropriate by both the Court of Criminal Appeals and this court after a review of the aggravating and mitigating circumstances found in the case by the trial judge." Jacobs v. State, supra, (emphasis added).

Appellate review of the substantive sentencing decision itself in death cases does exist in Alabama and it is done in two ways--independent appellate weighing of the aggravating and mitigating circumstances to determine the appropriateness of the sentence and comparative review at the appellate level of the sentence with others which have been reviewed in similar cases. As the Alabama Court of Criminal Appeals explained in Beck v. State, 365 So. 2d 985, 1000 (Ala. Cr. App. 1978):

> Under the new Alabama death penalty statute, the defendant has a second chance for life with the trial judge, a third with Court of Criminal Appeals, and a fourth with the Supreme Court of Alabama. Not only are decisions of the trial judge in death cases reviewed to ensure a fair and impartial trial, but they will ensure consistency and uniformity of sentencing.

An example of a recent case in which the independent weighing of aggravating and mitigating circumstances at the appellate level was expressly revealed in the opinion is Roger Scott Thomas v. State, ___So. 2d___(Ala. Cr. App. March 27, 1979) Ms. Op. at 19, where the Court of Criminal Appeals noted:

> The trial judge in his order noted the aggravating circumstances, which were here averred and proved at trial, and also determined by the trial judge in the post sentence hearing, as required by law. Additionally, this Court has carefully weighed the aggravating and mitigating circumstances independently.
>
> We are of the opinion that the punishment here imposed fits the crime for which the appellant has been found duly guilty. (emphasis in original) (Footnotes omitted)

Another example is Beck v. State, 365 So. 2d at 1005 where the appellate court stated:

> We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.

The appropriateness of the sentence in view of all the facts and circumstances was also noted in Herbert Lee Richardson v. State, supra, Ms. Op. at 39-40.

In the opinion of Eddie Barnard Neal, supra, Judge Bowen of the Court of Criminal Appeals explained, Ms. Op. at 29 (concurring opinion):

> The import of Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977), affirmed, 361 So. 2d 640 (Ala. 1978), and Clements v. State, Ala. Cr. App., 7 Div. 575 (Ms. May 16, 1978), reversed on other grounds, Ala. 77-643 (Ms. April 17, 1979), is that this court must independently weigh the aggravating and mitigating circumstances to determine whether they are sufficient to support a sentence of death.

No member of the Alabama Court of Criminal Appeals and no member of the Alabama Supreme Court has ever expressed any doubt about this or made any suggestion to the contraty.

Alabama appellate courts also exercise comparative appellate review of sentences in capital cases. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), was the first case under Alabama's new death penalty statute which reached the appellate level. Since there were no other cases under the new act with which to compare the sentence on appeal, Alabama's appellate courts compared it to sentences in pre-Furman cases under Alabama's old capital punishment statute. The United States Supreme Court has recognized that such a practice is necessary and appropriate at the inception of a new capital punishment statute. Gregg v. Georgia, 428 U.S. 153, 204, n. 56 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). In performing its comparative appellate review function, the Alabama Supreme Court stated:

> The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's automatic appeal statute, have been reversed and the cause is remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sencence of death. We are familiar with other cases reviewed by this Court in the last decade involving death sentences and we are convinced that the sentence here was not arbitrarily or capriciously entered....Jacobs v. State, 361 SO. 2d at 644.

In Roy Frank Clements v. State, Ala. Cr. App., 370 So. 2d 708 (1978), rev'd on other grounds Ex Parte: Roy Frank Clements, Ala., 370 So. 2d 723 (1979), the Alabama Court of Criminal Appeals was presented with the argument that Alabama's statute did not provide for a comparative appellate review. In rejecting that argument, the Court said:

> As Judge Harris pointed out in Jerry Wayne Jacobs, supra, the Supreme Court of Alabama, in the past thirty-five years, has reviewed approximately ninety-five death cases and has reversed twenty-five of them for various reasons, including excessive punishment, and also where the verdict was contrary to the great preponderance of the evidence.
>
> This court in Evans and Ritter v. State, Ala. Cr. App., 1 Div. 837, Ms. October 25, 1977, expressly pointed out that we would also weigh the aggravating and mitigating circumstances independently. Therefore, appellant's contention is without merit.

Since the time of the Alabama Supreme Court's review of the sentence in Jacobs v. State, supra, and the Alabama Court of Criminal Appeals opinion in Roy Frank Clements v. State, supra, more death penalty cases have reached the appellate level. This has made possible a comparison of the sentence under review with other sentences which have been reviewed under the same statute. An example of a case in which this comparative appellate review was explicitly performed in an appellate opinion is Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978), aff'd 365 So. 2d 1006, where the Alabama Court of Criminal Appeals held:

> We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> The facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra.
>
> It seems to us that the result is inescapable that the punishment, too, should be the same.

In summary, all capital cases in which a sentence of death is imposed upon a defendant are automatically reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. These two appellate courts independently weigh the aggravating and mitigating circumstances to determine the appropriateness of the sentence. Comparative appellate review is also performed at the appellate level.

IV

THE EXCLUSION OF PROSPECTIVE JURORS WAS PROPER WHERE JURORS MADE IT UNMISTAKABLY CLEAR THAT THEIR ATTITUDE TOWARD THE DEATH PENALTY WOULD PREVENT THEM FROM RENDERING AN IMPARTIAL VERDICT AS TO THE DEFENDANT'S GUILT.

A prospective juror may be excused for cause where he has been examined by the trial judge and a determination made that the juror's feelings as to capital punishment are sufficiently strong so that he would automatically refuse to impose a death sentence regardless of the evidence produced at trial, and despite the trial court's instructions. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776 (1968). Moreover, in Witherspoon this Court held that a prospective juror may properly be excused for cause where his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt.

In Boulden v. Holman, 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed 2d 433 (1969) it was held that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be able to abide by the existing law and follow conscientiously the trial court's instructions and consider fairly the imposition of the death

sentence in a particular case. Hence, when a juror indicates an aversion to the death penalty, the trial court must determine whether the juror, despite his beliefs, would be able to reach an impartial decision as to the defendant's guilt and, after having found the defendant guilty, be able to consider all the penalties provided by law, including the death penalty.

Hence, the critical question on appeal is not how the phrases used to qualify the jurors have been construed by the courts and commentators, but how they might be understood by prospective jurors.

In the case at bar, five jurors were challenged for cause by the state and excused because of their opinions on capital punishment. The trial court began its qualification of the veniremen on capital punishment with the following questions:

> "Is there any juror who has a fixed and an abiding conviction against a legal punishment of death by electrocution? Those of you in Panel 1 who have such a fixed and abiding against a legal punishment of death by electrocution, please stand."

Defense counsel objected to this question and after overruling the objection the court continued to question the veniremen.

> "Did anyone in Panel 1 state that you had a fixed and abiding conviction against a legal punishment of death by electrocution that would prevent you from imposing a guilty verdict in this case -- which is the only verdict you can return of guilt? You can return a verdict of Not Guilty; or you can return a verdict of Guilty, and if you do return a verdict of Guilty the statute provides that you must fix the punishment at death. (No response.) Does anyone in Panel 2 have a fixed and abiding conviction against fixing a punishment at death by electrocution in such a case as this? (Juror stood.) What is your full name, ma'am?
>
> "JUROR: Donna Fulmer Keaton.

"THE COURT: The statute provides that you will fix the death penalty if you find that Mr. Wilson did unlawfully, intentionally, and with malice aforethought, kill Joe Lee Gilliland; that constitutes what we normally consider the elements of First Degree Murder. If the State proves that, and also in addition to that proves that Mr. Wilson was under a sentence of life imprisonment prior to this, would you have a fixed opinion against imposing the death penalty? (no response.) Just give us your best judgment- yes or no.

"JUROR KEATON: Yes."

The state then objected for cause, and the trial judge excused this juror over defense counsel's objection.

After similar questioning, the trial judge excused a second juror.

"THE COURT: Does any other juror in Panel 2 at this time have a fixed and abiding conviction against fixing the death penalty at death by electrocution if they find that this was a First Degree Murder committed after Mr. Wilson had previously been sentenced to life imprisonment? (No response.) In Panel 3? (Juror stood.) All right, sir; give us your full name.

"JUROR: Thomas Joseph Beckham.

"THE COURT: Mr. Beckham, you have a fixed opinion that under no circumstance would you sign any guilty verdict which would require the fixing of the death penalty?

"JUROR BECKHAM: I do."

A third juror was also excused for cause.

"THE COURT: Does any juror in Panel 4 have a fixed and abiding conviction against fixing the punishment at death by electrocution? (Juror stood.) Are you Mrs. Hobart?

"JUROR: Yes.

"THE COURT: If you found that the offense was Murder in the First Degree, and if you also found that Mr. Wilson had previously been sentenced to life imprisonment, would you have an abiding conviction against a verdict of guilty if it required the death penalty?

"JUROR HOBART: I would have mixed emotions about it.

"THE COURT: In your best judgment, yes you would, or no you wouldn't?

"JUROR HOBART: Right. .

"THE COURT: Well, what are you telling us; are you --

"JUROR HOBART: Really, I don't believe in it.

"THE COURT: You do feel like you have a fixed opinion against it?

"JUROR HOBART: Yes."

A fourth prospective juror was excused for cause.

"THE COURT: Does any juror in Panel 5 have a fixed opinion agaist a legal punishment - finding a Defendant guilty and fixing his punishment at death by electrocution? (Juror stood.) What is your full name, m'am?

"JUROR: Yes, Betty Miller Brunson.

"THE COURT: Mrs. Brunson, you would have a fixed opinion against finding a verdict of guilty if you felt that it required the death penalty?

"JUROR BRUNSON: I don't believe I could say Kill Him.

"THE COURT: You feel that you do have a conviction against it?

"JUROR BRUNSON: Yes."

Finally, a fifth juror was excused for cause.

"THE COURT: Marshall Gunn in Panel 5; Mr. Gunn, do you have a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty?

"JUROR GUNN: Yes, sir."

Additionally the trial judge questioned the five excused jurors as a group.

"THE COURT: Now, what the Court intended to ask you is, after hearing all of the evidence in the case, if you were required to return a verdict of guilty, which would automatically fix his punishment at death, the Court has asked you now if you have an abiding conviction against assessing such a verdict? I believe that five of you have responded that you would; those five, is that the way you understood the question? (The five said jurors nodded in the affirmative.)"

As noted in the opinion of the Alabama Court of Criminal Appeals, in addition to being asked whether or not they were opposed to capital punishment, each of the five jurors was also asked a question that elicited a reply indicating that under no circumstances would he or she be in favor of the death sentence regardless of what the evidence showed.

In substance, Juror Keaton replied that she would have a fixed opinion against imposing the death penalty even if the state proved Wilson guilty as charged in the indictment. Juror Beckham stated that he had a fixed opinion that under no circumstance would he sign any guilty verdict which would require the fixing of the death penalty. Juror Hobart stated that she would have mixed emotions about returning a verdict of guilty if it required the death penalty and even if she found Wilson guilty as charged in the indictment. She further stated that she had mixed emotions about it, that she really did not believe in it and had a fixed opinion against it. Juror Brunson stated that she did not believe she could say kill Wilson if a verdict of guilty required the death penalty. Juror Gunn stated that he had a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty. Thus, each juror indicated in one manner or another, by implication if not fact, that he or she would not return a verdict of guilty if such a verdict required the death penalty.

Finally, in an apparent abundance of caution, the trial judge asked the five jurors as a group if they would have an abiding conviction against assessing a guilty verdict if they were required to return a verdict of guilty which automatically fixed punishment at death.

Each juror's answer as a whole displays an unequivocal reluctance to render a guilty verdict, knowing that the defendant would be subjected to the death penalty. State v. Avery, 286 N.C. 459, 212 S.E. 2d 142 (1975), vacated in part on other grounds, ____U.S.____, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Clearly, the jurors were properly excluded and petitioner has failed to show any constitutional deprivation.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

Charles A Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL

Jean Williams Brown
JEAN WILLIAMS BROWN
ASSISTANT ATTORNEY GENERAL

Charles Lawson Little
CHARLES LAWSON LITTLE
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Jean Williams Brown
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Al 36130

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on Hon. Wm. N. Clark, Attorney at Law, 1033 Frank Nelson Bldg., Birmingham, Alabama 35203 by placing same in the U.S. Mail, postage prepaid this_____ day of October, 1979.

Jean Williams Brown

JEAN WILLIAMS BROWN
ASSISTANT ATTORNEY GENERAL